

Public-private arbitration and the public interest under English law

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Abstract: Together with the increase in the number of public-private contracts, recent years have seen a marked proliferation in public-private arbitrations. This article explores the public interest implications which may arise in such arbitrations and examines how public-private arbitration is treated under English law. We argue that, due to the lack of a developed administrative law sphere in England and the historical development of arbitration as an exclusively private mode of dispute resolution, the current legal framework of arbitration in England has developed around the private law paradigm of a commercial dispute involving private actors. This private law paradigm results in a conceptual and legal void in respect of how public interest is accounted for, and protected, in arbitrations involving public bodies under English law. Therefore, we suggest that English arbitration law needs to reconceptualise public-private arbitration and embed it in a public law narrative.

Key words: administrative law; arbitration; Arbitration Act 1996; public interest; public policy; public law; public-private law divide; public-private contracts

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I. Introduction

The last forty years have witnessed an increased interaction between public and private sectors and increased reliance on private actors to perform public functions in a wide range of areas, including complex infrastructure projects, welfare accommodation, crime and justice and military and defence. These developments have led to a substantial increase in the number of public-private contracts, many of which favour arbitration and other private forms of dispute resolution over the traditional resolution of disputes in the national courts. Although, like a typical commercial arbitration between private parties, public-private arbitrations arise out of a contractual dispute, the crucial point of distinction is the public interest implications associated with the latter and it is these implications that make public-private arbitration important to examine.

This article aims to clarify the concept of public-private arbitration and to critique the way in which public-private arbitration is treated under English arbitration law. The main thesis of this article is that the private law paradigm upon which English arbitration law is based leaves the public interest both unaccounted for, and unprotected, in respect of public-private arbitrations.

The article proceeds as follows: Section II offers an account of the rise of public-private arbitration. Section III examines more closely the definition of public-private arbitration and, in particular, the concept of the public interest. Section IV examines the treatment of public-private arbitration under English law and demonstrates that English law fails to distinguish between private arbitrations and public-private arbitrations and has developed around the private law paradigm of a commercial dispute.

While English law applies a private law paradigm to public-private arbitrations, as Section V shows, other jurisdictions have recognised the distinct nature of public-private arbitration. The lack of a distinct legal and conceptual framework for public-private arbitration in England raises two important questions. The first question is why such a framework is lacking under English law. As Section VI argues, this can be attributed to the lack of a developed administrative law sphere in England and to the fact that English arbitration law has developed as an exclusively private mode of dispute resolution. The second, possibly more important, question is whether the existing private law paradigm on which English arbitration law is based can adequately protect the public interest. This question is addressed in Section VII, which argues that the private law paradigm underlying English arbitration law leaves the public interest both unaccounted for, and unprotected, in respect of public-private arbitrations. The final section makes some proposals as to how this deficit may be addressed.

II. The rise of public-private arbitration

Traditionally, arbitration has been the predominant mode of dispute resolution for contractual disputes between two private parties, typically corporations. However, in recent years with the collapse of the non-arbitrability doctrine, the scope of arbitration has greatly expanded. In the area of commercial arbitration, for example, it is now accepted that arbitrators have authority to determine not only claims pertaining to the formation, interpretation and performance of commercial contracts, but also statutory claims that may have crucial social implications,¹ such as competition law claims, tax

¹T. Carbonneau, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability'

claims or claims arising out of securities transactions.² Similarly, in the area of investment law, international arbitration tribunals regularly review investor claims concerning government measures, including financial and environmental measures, which concern the regulatory sovereignty of the host nation and would normally fall within the exclusive jurisdiction of national courts.³

Concurrent with this development, a combination of economic and ideological factors has led to increased interaction between public and private sectors and increased reliance on private actors to perform public functions in virtually every industrialised state.⁴ In the UK, the transfer of government powers to the private sector gathered pace during the 1980s.⁵ Such outsourcing arrangements can take various forms including entrusting private partners with the legal responsibility to provide such services ('contracting out') and collaborating with private parties for the purpose of achieving a public function, albeit

(1994) 2 Tul J Intl & Comp L 196.

²K. Youssef, 'The Death of Inarbitrability' in L. Mistelis and S. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009) 47. See generally L. Mistelis and S. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009).

³UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (UNCTAD 2015) xi.

⁴J. Freeman, 'The Private Role in Public Governance' (2000) 75 NYU L Rev 543; J.B. Auby, 'Contracting Out and 'Public Values': A Theoretical and Comparative Approach' in S. Rose-Ackerman and P.L. Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2013) 512.

⁵A. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press 2001) 3.

that ultimate legal responsibility to the public remains with the public body.⁶ Legislative developments have lent impetus to this movement by, for example, requiring local authorities to engage in competitive tendering processes⁷ and by facilitating the exercise of certain public powers by private entities.⁸ These developments, in turn, have led to a marked increase in the number of public-private contracts (ie contracts entered into by public bodies with private entities).⁹

The connection between these two developments - the expansion of arbitration's domain and the rise of the 'contracting state' - is the fact that many public-private contracts favour arbitration and other private forms of dispute resolution over resolution of disputes in the national courts.¹⁰ For example, the Model Terms and Conditions of Contracts for Goods issued by the UK Office of Government Commerce provide for a multi-tiered dispute resolution process which ends in arbitration in the event that informal negotiation and mediation are unsuccessful¹¹ and similar dispute resolution provisions are common in

⁶See M. Freedland, 'Public law and private finance – placing the Private Finance Initiative in a public frame' [1998] PL 288; C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) ch 9.

⁷See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242.

⁸See Deregulation and Contracting Out Act 1994.

⁹J.B. Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 41. See also A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) 61.

¹⁰G.S. Tawil, 'On the Internationalisation of Administrative Contracts, Arbitration and the Calvo Doctrine' in A. van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series No 15 (Kluwer 2011) 325.

¹¹Office of Government Commerce, 'OGC Model Terms and Conditions of Contracts for Services' (OGC 2009) clause I2. See also HM Treasury, *Standardisation of PFI Contracts* (4th edn, 2007) ch 28.

standard forms of international construction contracts, typically adopted for procurement of public works.¹² Recent years have therefore seen both the general expansion of arbitration's domain as well as an increase in the number of public-private contracts providing for arbitration.

The expansion of arbitrations arising under public-private contracts has been accompanied by an increase in other forms of arbitration between public and private entities. In particular, since the registration of the first dispute under a bilateral investment treaty in 1987,¹³ the number of investment treaty arbitration cases (ie international arbitrations between a state entity and a foreign investor under an international investment treaty) has increased exponentially.¹⁴ However, investment treaty arbitration can be distinguished from contractual arbitrations between public and private bodies in a number of ways. In particular, while in contractual arbitrations, consent to arbitration is provided in the form of an arbitration clause, international investment treaties hold out to investors the right to consent to submit their dispute with the state hosting their investments to arbitration.¹⁵ Secondly, while contractual disputes are required to be determined in accordance with the governing law of the contract, disputes in investment treaty

¹²See for example FIDIC, 'Conditions of Contract for Construction, which are recommended for building or engineering works designed by the Employer or by his representative, the Engineer' (FIDIC 1999) clause 20.6.

¹³*Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, 4 ISCID Rep 245.

¹⁴As of July 2016, the total number of known treaty-based investor-state arbitrations is 696: see UNCTAD Investment Dispute Settlement Navigator at <http://investmentpolicyhub.unctad.org/isd>s (last accessed 26 July 2016).

¹⁵See *Occidental Exploration and Production Company v Ecuador* [2005] EWHC 774 (Comm); *Occidental Exploration and Production Company v Ecuador* [2006] 2 WLR 70.

arbitration often arise out of the regulatory actions of the state hosting the investor's investment and concern rights and obligations at the level of public international law under international treaties.¹⁶

Both forms of arbitration may, however, have implications for the public interest. The public interest implications associated with investment treaty arbitrations¹⁷ and the question of whether investment treaty arbitration should be considered to form part of private or public law have been the subject of extensive discourse.¹⁸ However, the issues associated with contractual arbitrations between public and private bodies are less well traversed and the question of whether such arbitrations should be viewed through a private law or a public law lens has not been sufficiently explored under domestic law and certainly not under English law.¹⁹ This article examines these issues and therefore, while acknowledging that the term 'public-private arbitration' may be defined to

¹⁶In relation to a third form of investment arbitration, namely that under national legislation, see C. Schreuer, 'Investment Arbitration based on National Legislation' in G. Hafner, F. Matscher and K. Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte, Liber Amicorum Wolfram Karl* (Facultas 2012).

¹⁷See for example P. Dupuy, E. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); M. Cordonier Segger, M. W. Gehring and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer 2011).

¹⁸See for example G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007); S. W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010).

¹⁹There has been some debate on this topic in relation to other jurisdictions: see for example D. Renders, P. Delvolvé and T. Tanquerel (eds), *L'arbitrage en droit public* (Bruylant 2010); M. Audit (ed), *Contrats publics et arbitrage international* (Bruylant 2011).

encompass investment treaty arbitration,²⁰ uses that term to describe a contractual arbitration between a public body and a private body which implicates the public interest.²¹

While certain issues pertinent to public-private arbitration have been touched upon in existing literature, the phenomenon of public-private arbitration has not been focussed upon. Thus, while a number of authors have recognised that arbitration does not fit neatly into the category of ‘private’ governance as it depends upon state support²² and as arbitrators may need to take account of mandatory rules of law,²³ this analysis has not focussed on the role of public bodies as participants in arbitrations. In addition, the ‘vanishing trial’ phenomenon (ie the increasing tendency to resolve disputes other than by judicial determination and, in particular, through alternative dispute resolution (ADR)) and its effect on the protection of certain public interests has been the subject of

²⁰See for example S. Schill, ‘Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica’ at <http://acil.uva.nl/research/research-projects/content/transnational-private-public-arbitration-lexmercpub.html> (last accessed 26 July 2016).

²¹ See Section III below.

²²See for example C. A. Whytock, ‘Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration’ (2010) 12 Business & Politics: Article 10. See also A. Stone Sweet, ‘The new Lex Mercatoria and Transnational Governance’ (2006) 13 J Eur Pub Pol’y 627.

²³A. F. M. Maniruzzaman, ‘International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview’ (1990) 7 J Int’l Arb 53; M. Blessing, ‘Mandatory Rules of Law versus Party Autonomy in International Arbitration’ (1997) 14 J Int’l Arb 23; A. Barraclough and J. Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 Melb J Int’l L 205; A. Sheppard, ‘Mandatory Rules in International Commercial Arbitration – An English Law Perspective’ (2007) 18 Am Rev Int’l Arb 121.

commentary²⁴ as have the issues associated with using ADR to resolve public law cases in particular.²⁵ However, this analysis has concentrated primarily on the negotiated settlement of public law disputes²⁶ or on the use of facilitative ADR processes such as mediation.²⁷ Finally, a considerable body of literature has developed in the UK which describes the rise of ‘government by contract’ and highlights the need for public law to evolve to take account of this contractualisation process.²⁸ However, this literature does not focus on the implications of the use of arbitration, as a private dispute resolution mechanism, in respect of disputes under public-private contracts.²⁹ Therefore, while, in

²⁴See for example M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 J Emp Leg Stud 459; R. Dingwall and E. Cloatre, ‘Vanishing Trials?: An English Perspective’ (2006) J Disp Resol 51; Lord Neuberger of Abbotsbury, ‘The Fourth Keating Lecture: Equity, ADR, Arbitration and The Law: Different Dimensions of Justice’ (19 May 2010); L. Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 OJLS 59.

²⁵See for example V. Bondy, M. Doyle and V. Reid, ‘Mediation and Judicial Review - Mind the Research Gap’ (2005) 10 Jud Rev 220; M. Supperstone, D. Stilitz and C. Sheldon, ‘ADR and Public Law’ [2006] PL 299.

²⁶See for example O. M. Fiss, ‘Against Settlement’ (1983-1984) 98 Yale LJ 1073; D. Luban, ‘Settlements and the Erosion of the Public Realm’ (1994-1995) 83 Geo LJ 2619; V. Bondy and M. Sunkin, ‘Settlement in judicial review proceedings’ [2009] PL 237.

²⁷See for example V. Bondy and L. Mulcahy, ‘Mediation and Judicial Review: An empirical research study’ (The Public Law Project 2009).

²⁸See for example G. S. Morris and S. Fredman, ‘The Costs of Exclusivity: Public and Private Re-examined’ [1994] PL 69; Mark R. Freedland, ‘Government by Contract and Public Law’ [1994] PL 86; M. Freedland, ‘Public law and private finance – placing the Private Finance Initiative in a public frame’ [1998] PL 288; P. Vincent-Jones, ‘The regulation of contractualisation in quasi-markets for public services’ [1999] PL 304; A. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press 2001).

²⁹cf A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) 224-227.

different contexts, it has been recognised that contracts with public bodies are not purely creatures of private law, that arbitration does not fit neatly into the category of ‘private’ governance and that the use of ADR may, in certain cases, adversely affect certain public interests, the rise of public-private arbitration and its legal treatment, which straddles these issues, has remained largely uncharted.

III. Public-private arbitration and the public interest

This section further explores what is meant by the term public-private arbitration and, in particular, the concept of the public interest. However, it is first necessary to consider what is meant by a ‘public body’ in the context of public-private arbitration. In determining what is meant by this term, a ‘source’ based test or a ‘functional’ based test may be applied. The former test focusses on the source of power of the body in question and considers whether the body’s power derives from statute or prerogative. On the other hand, a ‘functional’ based test examines the nature of the power exercised by the body and, in particular, whether it has a ‘public element’ or is under some ‘public duty’.³⁰ Application of this ‘functional’ based test is not without its difficulties.³¹ However, as its inherent flexibility has the potential to address the increasing exercise of public power and performance of public functions by private parties (a problem which also lies at the heart of this article), the term ‘public body’ is, for the purposes of this article, used to describe not only ‘obvious’ public authorities but also those bodies that perform a public function or are under some public duty.

³⁰ *R v Panel on Take-Overs and Mergers, ex p Datafin* [1987] 2 WLR 699.

³¹ See Section VI below.

Crucially however, the definition of public-private arbitration requires not only that a contractual dispute between a public and private body has been submitted to arbitration but also that the dispute implicates the public interest.³² Therefore, as the concept of public interest is an integral part of the definition of public-private arbitration and as it informs the approach taken in this article, it is necessary to take a closer look at its meaning. Defining what is meant by the public interest is difficult,³³ as the term carries a variety of meanings depending on the context in which it is used: for example, the term public interest may have a different meaning in constitutional discourse than it has in discourse relating to economics, sociology, political theory or regulation.³⁴

As Held's seminal work demonstrated, there are three types of approaches to public interest: common interest theories, preponderance theories and unitary conceptions.³⁵ Common interest theories are based on the hypothetical of the existence of interests common to all members of society, while preponderance theories look to a majority of interests. Common and preponderance interest theories thus tend to conceptualise public interest on a majoritarian basis. On the other hand, the unitary conception takes a

³²Similarly, under English law, not all decisions made by a public body are subject to judicial review. An additional 'public law' element is required: see J. Beatson, 'Which Regulatory Bodies are Subject to the Human Rights Act?' in J. Beatson (ed), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) 102.

³³See generally S. M. King, B. S. Chilton and G. E. Roberts, 'Reflections on Defining the Public Interest' (2010) 41 *Administration & Society* 954.

³⁴*ibid* 966.

³⁵V. Held, *The public interest and individual interests* (Basic Books 1970).

normative approach and places emphasis on what ought to be in the public interest from a social welfare viewpoint.³⁶

While a crude conception of democracy would favour a majoritarian approach to public interest, in a system displaying constitutional features, the public interest can, and should, be directed towards serving fundamental constitutional values, including values reflecting minority interests.³⁷ In the context of English law therefore, we subscribe to an inclusive definition of public interest as a set of interests reflecting the minimal value structure underpinning society, as these values are shaped by constitutional and administrative law principles, and democratic institutions and traditions.³⁸ Such a normative approach allows us to identify a core meaning of public interest in considering disputes under public-private contracts.

Thus, where economic and social policy considerations arise in connection with a contractual dispute between a public body and a private body, the public interest is implicated. Economic considerations include considerations such as ‘value for money’ (which arise, for example, in relation to procurement contracts), the allocation of public resources and the development of important infrastructure needed for the operation of an economy (such as airports and highways).³⁹ Social policy considerations include issues relating to the implementation of governmental policies in sectors that are sensitive for

³⁶M. Feintuck, *The Public Interest in Regulation* (Oxford University Press 2014) 11.

³⁷A. Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012) 151-152. See also I. O’Flynn, ‘Deliberating About the Public Interest’ (2010) 16 *Res Publica* 299, 313.

³⁸n 33 above, 958.

³⁹See G. Niemeyer, ‘Public Interest and Private Utility’ in C.J. Friedrich (ed), *Nomos V: The Public Interest* (Atherton Press 1962).

the public, such as health, education, social welfare and immigration. Where a contractor is involved in providing services directly to members of the public, it can be considered more likely that a dispute under that contract will implicate the public interest⁴⁰ than where the contractor is merely contributing to an activity which is controlled and co-ordinated by the public body (eg where the contractor is supplying goods or support services to the public body).⁴¹ However, it is not possible to draw a bright line distinction between these two categories of contract as disputes under the latter category of contract can also implicate the public interest where, for example, the contract is high-value and where performance of the contract is essential to the provision of an essential public service or to the implementation of important governmental policies. In requiring more than just the presence of a contract with a public body to trigger the application of a public interest analysis, this approach is consistent with that taken by the English courts to the analogous issue of determining the applicability of public law to the actions of a private service provider.⁴²

Having established a working definition of public interest, a recent example of a public-private arbitration with public interest implications is worth considering. This concerned a dispute between the Secretary of State for the Home Department and the US defence company, Raytheon Systems Limited, in respect of a 2007 contract for the design, development and delivery of a multimillion pound technology system (e-Borders) which would reform UK border controls by establishing an electronic system to vet travellers

⁴⁰For a related argument A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) ch 8.

⁴¹*ibid* 55 and 79 referring to a contract to supply paper clips to a public authority as an archetypal example of a contract to which application of public law norms would be inappropriate.

⁴²See Section VI below.

entering and leaving the UK. When the Home Office terminated the contract in 2010 for significant delays in progress of the works, Raytheon commenced arbitration proceedings claiming substantial damages for unlawful termination. The arbitration proceedings under the rules of the London Court of International Arbitration were confidential with the arbitrators being English and American (nominated by the Home Office and Raytheon respectively) and the chairman being Canadian. The arbitrators decided, apparently within an exclusive private law setting, that the Home Office had unlawfully terminated the contract and awarded damages to Raytheon of the amount of approximately £190 million plus £38 million in respect of interest and the claimant's costs. The *E-borders* award raised serious concerns in the British government and attracted intensive media and public interest, with the focus being on the impact of the award on the public finances and on UK border security.⁴³ While the award was challenged by the Home Office and was subsequently set aside by the High Court for serious irregularity,⁴⁴ the High Court ultimately determined that the dispute should be referred back to arbitration before a different panel of arbitrators.⁴⁵ Following the issuance of the High Court judgment in February 2015, Keith Vaz, the chairman of the Commons home affairs select committee, observed that the E-borders dispute had 'cost the British taxpayer millions of pounds. We still do not have an e-Borders programme, nor do we have information that can help us determine what went wrong with the Raytheon contract'.⁴⁶ Despite the Home Office's success in challenging the arbitration award, the Home Office announced in March 2015

⁴³See B. Quinn, 'UK taxpayer faces £220m bill over e-borders contract termination' *The Guardian* (London, 19 August 2014).

⁴⁴ *The Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4375 (TCC).

⁴⁵*The Secretary of State for the Home Department v Raytheon Systems Limited* [2015] EWHC 311 (TCC).

⁴⁶Quoted in A. Travis, 'Award for cancellation of e-Borders contract is set aside by court' *The Guardian* (London, 17 February 2015).

that it had reached a negotiated resolution with Raytheon and was to pay £150 million to Raytheon in full and final settlement of the dispute.⁴⁷

Overall, public-private arbitrations can have far-reaching implications for the public interest and, as will be elaborated upon in Section VII, may give rise to threats to fundamental public law norms. This makes it important to analyse how English law views public-private arbitration and, in particular, to examine how the public interest is accounted for under English arbitration law.

IV. English arbitration law and public-private arbitration

While the use of arbitration to resolve disputes between a public body and a private party has become more common,⁴⁸ English law does not distinguish between private arbitrations and public-private arbitrations. Indeed, having developed around the private law paradigm of a commercial dispute involving private actors,⁴⁹ English arbitration law characterises has adopted party autonomy as its cardinal principle. Thus, the submission of a dispute to arbitration is conceptualised as a process whereby the parties (archetypically sophisticated commercial parties negotiating at arm's length) choose to

⁴⁷Home Office letter on e-Borders settlement, 27 March 2015, at

<https://www.gov.uk/government/news/home-secretary-letter-on-e-borders-settlement> (last accessed 26 July 2016).

⁴⁸A. Wald and J. Kalicki, 'The Settlement of Disputes between the Public Administration and Private Companies by Arbitration under Brazilian Law' (2009) 26 J Int'l Arb 557, 559.

⁴⁹See generally J. D. M. Lew and M. Holm, 'Chapter 1: Development of the Arbitral System in England' in J. D. M. Lew, H. Bor, et al (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013).

contract out of the system of public justice and submit their disputes to a private dispute resolution mechanism. In accordance with this ‘contractual’ understanding of arbitration,⁵⁰ the Arbitration Act 1996 (the 1996 Act) requires the English courts to adopt a non-interventionist approach in respect of the arbitration process. This means that the role of the courts up to the point at which the award is made does not vary depending on whether or not the arbitration involves a public body.

Further, English law does not differentiate between public-private arbitrations and private arbitrations in considering whether a particular dispute may be submitted to arbitration or whether public bodies can submit to arbitration. This lack of differentiation also extends to the conduct of the proceedings, including the appointment of arbitrators, the qualifications which arbitrators are required to have, the presentation of evidence, the grounds for intervention by third parties (including members of the public) and, significantly, the question of whether the arbitration proceedings will be private and confidential.

Similarly, after the arbitration is concluded, the scope of review of arbitration awards by English courts does not depend on whether or not the arbitration involves a public body or implicates the public interest. Once the arbitration tribunal has rendered its award, a party may generally only challenge the award on the basis that the tribunal lacked substantive jurisdiction (under section 67 of the 1996 Act), that there was a serious irregularity affecting the tribunal, proceedings or award (under section 68 of the 1996

⁵⁰See generally A. Barraclough and J. Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 Melb J Int’l L 205, 209-210.

Act)⁵¹ or, in certain limited circumstances, on a question of law (under section 69 of the 1996 Act).⁵²

Thus, under section 68, the challenging party must demonstrate conduct amounting to a serious irregularity which falls within the exhaustive list of categories in section 68(2) and that the irregularities identified caused, or will cause, the party substantial injustice. Accordingly, the House of Lords has remarked that section 68 was conceived of: ‘...as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.’⁵³ Similarly, as section 69 of the 1996 Act is not mandatory in nature,⁵⁴ parties often agree in advance that an arbitration award will be final and binding and cannot be appealed.⁵⁵ Furthermore, even where the possibility of an appeal under section 69 has not been excluded, unless all other parties to the proceedings agree to such appeal, leave of the court must be sought to bring the appeal and leave will only be granted if certain requirements specified in section

⁵¹See *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd’s Rep 503; *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm).

⁵²Admittedly, in allowing for an appeal on a question of law at all, English law permits greater judicial intervention than those jurisdictions that have adopted the UNCITRAL Model Law: see D. Wolfson and S. Charlwood, ‘Chapter 25: Challenges to Arbitration Awards’ in J. D. M. Lew, H. Bor, et al (eds.), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013) at [25-68] – [25-69].

⁵³*Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] 3 All ER 789 at [27], citing the Report of the Departmental Advisory Committee of Arbitration Law on the then Arbitration Bill at [280].

⁵⁴Arbitration Act 1996, s 4(1) and Sched 1.

⁵⁵A. Sheppard, ‘Mandatory Rules in International Commercial Arbitration – An English Law Perspective’ (2007) 18 Am Rev Int’l Arb 121, 136.

69(3) of the 1996 Act are satisfied. For these reasons, leave to appeal on a point of law is rarely granted by English courts and successful section 69 applications are rare.⁵⁶ Overall therefore, the grounds for challenge of arbitration awards under English law are framed narrowly, fall short of providing for a review of the award on the merits (including an error in law) and do not differentiate as between public-private and private arbitrations.

To date therefore, the rise of public-private arbitration has left undisturbed the private law paradigm underlying English arbitration law. This means that arbitration and public law have been regarded as occupying separate legal spheres and neither area of law has substantially influenced the design or practice of the other.⁵⁷ In adopting this approach, English law differs from the approach taken in a number of other jurisdictions, in which the potential for overlap between arbitration law and public law has been recognised.

V. Public-private arbitration in other jurisdictions

While English law applies a private law paradigm to public-private arbitrations, certain distinctions between public-private arbitration and private arbitration have been recognised in other jurisdictions. For a start, many jurisdictions have imposed restrictions on the extent to which public bodies can submit disputes to arbitration.⁵⁸ While recent

⁵⁶ M. Marshall, 'Section 69 almost 20 years on....', Kluwer Arbitration Blog 24 June 2015, at: <http://kluwerarbitrationblog.com/blog/2015/06/24/section-69-almost-20-years-on/> (last accessed 26 July 2016).

⁵⁷ On a similar topic see M. Supperstone, D. Stilitz and C. Sheldon, 'ADR and Public Law' [2006] PL 299.

⁵⁸ n 48 above, 559-563. See also J. D. M. Lew, L. A. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) 733-737.

years have seen a loosening of some of these restrictions,⁵⁹ they are indicative of a different perspective on the relationship between arbitration law and public law. For example, in France, public bodies are generally prohibited from entering into arbitration agreements by Article 2060 of the Civil Code which provides to the effect that ‘there can be no arbitration...in disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned.’ This rule, which is regarded as a general principle of French public law,⁶⁰ recognises that arbitration may not be an appropriate forum to deal with public interest matters. Over the years and because of the growth in commercial collaborations between the public and private sectors, a number of exceptions to this rule have emerged.⁶¹ For example, in the *Galakis* case, the *Cour de Cassation* ruled that a French public body may consent to an arbitration agreement in connection with an international commercial contract.⁶² However, notwithstanding this trend, in *INSERM v Fondation Letten F. Saugstad*, it was recognised that, while the judicial courts will normally review an award between a French public body and a foreign legal entity, public-private arbitration awards should be subject to review by the administrative rather than the judicial courts where ‘mandatory rules of French public law’ are implicated.

⁵⁹ibid.

⁶⁰See Conseil d’Etat, Legal Opinion (Avis) of 6 March 1986, No. 339710.

⁶¹See for example Law No. 75-596 of 9 July 1975. See generally T. A. Brabant, ‘Arbitration and Company Law in France’ (2015) 12 Eur Company L 144, 144-148.

⁶²*Cour de Cassation*, 2 May 1966, 1966 Bull Civ I 199. See also H. Batiffol, ‘Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties’ (1968) 7 Colum J Transnat’l L 32.

The *INSERM* decision can be interpreted as representing a resurgence of the public-private law divide in French arbitration law.⁶³ This resurgence can also be seen in recent amendments to the procedure for arbitration proceedings: while the procedure for arbitration proceedings is substantially the same under French law whether these proceedings involve private or public entities, in the recent amendment of the French arbitration law in 2011, the principle of confidentiality of arbitration proceedings, which is normally applicable by default to domestic arbitrations, was not extended to international arbitrations.⁶⁴ As is generally accepted, one of the main reasons for this distinction was to ensure that arbitrations involving public bodies are conducted in a transparent manner.⁶⁵ Similarly, in Brazil, a recently enacted arbitration law⁶⁶ provides that public-private arbitration is subject to ‘the principle of publicity’ and all other laws governing transparency in public affairs.⁶⁷

VI. Reasons underlying the English approach to public-private arbitration

The lack of a distinct legal and conceptual framework for public-private arbitration in England raises two important questions. The first question is why such a framework is lacking. The second, and possibly more important, question is whether the existing private law paradigm on which English arbitration law is based can adequately account

⁶³cf the recent decision of the *Cour de Cassation* (8 July 2015) in *Syndicat mixte des Aéroports de Charente v Ryanair*, Arrêt n° 797 du 8 juillet 2015 (13-25.846).

⁶⁴Decree No. 2011-48 of 13 January 2011.

⁶⁵E. Gaillard and P. de Lapasse, ‘Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l’arbitrage’ (2011) 2 *Cahiers de l’Arbitrage* 263 at [106].

⁶⁶ Law No. 13,129 of 26 May 2015.

⁶⁷ibid Article 1 § 1o and Article 2 § 3o.

for the public interest in arbitrations involving public bodies. We examine both questions in turn.

There are two reasons that can explain the lack of a distinct legal and conceptual framework for public-private arbitration in England. The first is the lack of a developed administrative law sphere and of a separate body of administrative courts which would claim interest in the regulation of public-private arbitrations. In England, disputes involving public bodies with public interest implications have traditionally been submitted to the same ordinary courts as disputes between two private parties, and largely have been subject to the same procedure.⁶⁸ The absence of a body of administrative law rules extraneous to the common law can be contrasted with the emergence of administrative power and the strict separation between administration and justice in Continental Europe. In this regard, the French revolution of 1789 was the catalyst for the emergence of *administration publique*.⁶⁹ While previously the space between the state and the citizen was occupied by monarchy and a corporate society (the *ancien régime*),⁷⁰ after the French revolution this space came to be occupied by the State which developed its own institutional capacities, in order to pursue the interests of the public. Therefore, under the law of 16-24 August 1790, the ordinary courts in France were prohibited from reviewing administrative acts. However, while the lawmakers of the revolutionary period

⁶⁸cf Civil Procedure Rules, Part 54.

⁶⁹B. Sordi 'Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence of administrative law in Europe' in S. Rose-Ackerman and P. L. Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2013) 25. cf A. Venn Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302, 307.

⁷⁰C. Sumner Lobingier, 'Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model' (1942) U Penn L Rev 36, 37-39.

originally intended that claims against the administration should be judged by the administration itself, the separation between justice and administration led to the opposite result⁷¹ as a separate body of courts developed to review such acts.⁷² With the development of this separate system of administrative courts came the development of a *droit administratif*, whereby the activities of the state were subjected to legal principles and norms.⁷³ The French model of administration and administrative law then effectively emerged as the prevailing system of administration on the European continent.⁷⁴

Like France, Germany also has a long tradition of administrative law, albeit that the emergence of administrative law in the Germanic tradition was the result of evolution rather than revolution.⁷⁵ During the nineteenth century, German liberals strove to establish legal structures to limit the unfettered exercise of state power by the monarchs of the various German states.⁷⁶ The idea of *Rechtsstaat* was therefore constructed in order to reconcile the freedom of action of the State with the rights of the citizen and it gave birth to administrative law having the task of setting legal boundaries to central administration.⁷⁷ This development was ‘perfected’ by the creation of a separate system

⁷¹J. Massot, ‘The Powers and Duties of the French Administrative Judge’ in S. Rose-Ackerman and P. L. Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2013) 415.

⁷²L. Duguit, ‘The French Administrative Courts’ (1914) 29 *Political Science Quarterly* 385, 407.

⁷³*ibid* 407.

⁷⁴n 69 above, 28.

⁷⁵*ibid*.

⁷⁶G. Nolte, ‘General Principles of German and European Administrative Law - A Comparison in Historical Perspective’ (1994) 57 *MLR* 191, 198.

⁷⁷R. Gosalbo-Bono, ‘The Significance of the Rule of Law and its Implications for the European Union and the United States’ (2010) 72 *U Pittsburgh L Rev* 229, 241.

of administrative law courts through which substantive principles of administrative law were developed.⁷⁸

Thus, in France and Germany (and much of continental Europe), review of administrative action came to be placed outside of the purview of ordinary courts which gave rise to a self-conscious divide between public and private law. However, in England, it was only during the course of the twentieth century and because of the growth of a more centralised government that a distinct discipline of administrative law started to emerge.⁷⁹ Until well into the nineteenth century, the English administrative apparatus had developed on a case-by-case basis focusing on certain aspects of public life, such as regulation of work, railways, health, public education and poor relief,⁸⁰ with authority being assigned to the body which experience had shown best fitted to perform the work in question.⁸¹ For the same reasons, administrative review was performed by ordinary courts rather than by separate administrative courts.⁸² While the emergence of a more centralised form of government in England resulted in the creation of independent tribunals to hear appeals from decisions of certain administrative bodies and governmental departments, the adjudication of a large number of disputes involving public bodies still remained within the purview of the ordinary courts. In addition, the function of such tribunals has been

⁷⁸K. F. Ledford, 'Formalising the Rule of Law in Prussia: the Supreme Administrative Law Court 1876-1914' (2004) 37 *Central European History* 203, 204.

⁷⁹A. Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 *LQR* 148, 149.

⁸⁰n 69 above, 31.

⁸¹J. Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 *U Toronto L J* 53, 75.

⁸²n 69 above, 32.

conceptualised as essentially judicial (as opposed to administrative) in nature.⁸³ Similarly, although the administrative division of the High Court handles judicial review applications, this court constitutes a specialised ordinary (or judicial) court, which ‘operates inside the framework of the unitary legal system to which it remains firmly attached’.⁸⁴

The distinct approach taken under English law to the private-public law divide has also been significantly influenced by the lack of a written UK constitution and the resulting uncertainty as to the constitution’s content.⁸⁵ In particular, the loose, largely convention-based, nature of UK constitutional law has made it difficult for English administrative law to develop in a coherent manner.⁸⁶ In addition, the primacy of the rule of law within the UK constitutional system has served to shape the views of those (such as Albert Venn Dicey) who have argued that no distinction is required under English law between private and public law. Indeed, the influence of Dicey’s views is such that they can be considered to constitute a separate factor contributing to the view that a public-private law distinction

⁸³*Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218, (1957) at [40]; Report of the Review of Tribunals by Sir A. Leggatt, *Tribunals for Users: One System, One Service* (TSO 2001); Department for Constitutional Affairs, *Transforming Public Services, Complaints, Redress and Tribunals*, Cmnd 6243 (2004). See also J. Boughey, ‘Administrative law: the next frontier for comparative law’ (2013) 67 ICLQ 55, 67.

⁸⁴C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 19.

⁸⁵See generally E. Barendt, ‘Is there a United Kingdom Constitution?’ (1997) 17 OJLS 137. See also House of Commons Political and Constitutional Reform Committee, ‘A new Magna Carta?: Second Report of Session 2014-15’ (3 July 2014) 12-28 outlining the advantages and disadvantages of codifying the UK constitution.

⁸⁶M. R. Freedland, ‘Government by Contract and Public Law’ [1994] PL 86, 95.

does not form part of English law.⁸⁷ Dicey was suspicious of the very concept of administrative or public law and argued that English law, in general, subjects citizens and officials to the same rules of ordinary common law and that the rule of law, which he regarded as a private law concept from which Britain's unwritten constitution was derived,⁸⁸ was sufficient to keep in check administrative power and governmental discretion.

Admittedly, the distinction between public and private law (and the concept of administrative law in particular) has become increasingly significant in English law, which can largely be attributed to the rapid development since the 1960s of the law relating to judicial review of administrative action.⁸⁹ Fundamentally however, the idea of an autonomous body of public law rules extraneous to the common law remains a 'cuckoo in the nest'.⁹⁰

This lack of a well-embedded distinction between public and private law could, somewhat paradoxically, have assisted English law in responding to the increasing contractualisation of government over the last forty years and, more importantly, to the

⁸⁷C. Harlow, "Public" and "Private" Law: Definition Without Distinction (1980) 43 MLR 241; J. Beatson, "Public" and "Private" in English administrative law (1987) 103 LQR 34.

⁸⁸A. Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, London, 1915; reprint ed., Indianapolis, 1982; 1st ed., London, 1885), 107-122 and 202-203.

⁸⁹J. Beatson, "Public" and "Private" in English administrative law (1987) 103 LQR 34, 34-40. See also M. Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in M. Freedland and J.B. Auby (eds), *The Public-Private Divide – Une Entente Assez Cordiale?* (Hart Publishing 2006) 111.

⁹⁰See *Davy v Spelthorne BC* [1984] AC 262, 276. See also C. Harlow, "Public" and "Private" Law: Definition Without Distinction (1980) 43 MLR 241, 241.

hybrid legal phenomena which have resulted from such contractualisation, such as public-private contracts and public-private arbitrations. However, while English law has evolved to take account of these phenomena, this evolution has not been an unqualified success. Thus, while initially the English courts applied a ‘source’ based test in holding that public law applied only to the decisions of authorities which derived their power from statute or prerogative,⁹¹ the decision of the Court of Appeal in *R v Panel on Take-Overs and Mergers, ex p Datafin*⁹² marked a move to a ‘functional’ based test. In *Datafin*, the Court of Appeal held that the nature of the functions of an entity, and in particular whether that entity has a ‘public element’⁹³ or is under some ‘public duty’,⁹⁴ rather than just the formal source of its powers, must be taken into account.⁹⁵ The *Datafin* test therefore aimed to adapt the principles of judicial review to modern government practices and, in particular, the exercise of public power and performance of public functions by private parties.⁹⁶ Consistent application of the test has, however, proven difficult⁹⁷ and it has been described as being ‘singularly difficult to apply with any degree of certainty’.⁹⁸

⁹¹n 89 above, 47-50.

⁹²[1987] 2 WLR 699.

⁹³ibid 715.

⁹⁴ibid 714.

⁹⁵See J. Beatson, ‘Which Regulatory Bodies are Subject to the Human Rights Act?’ in J. Beatson (ed), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) 101 for an outline of the functional tests applied by the English courts in determining whether a decision of a particular body is subject to judicial review.

⁹⁶See *CECA Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552, at [99].

⁹⁷S. H. Bailey, ‘Judicial Review and the Public Procurement Regulations’ (2005) 6 PPLR 291, 294.

⁹⁸G. S. Morris and S. Fredman, ‘The Costs of Exclusivity: Public and Private Re-examined’ [1994] PL 69, 72.

The manner in which English law has defined the boundaries between administrative law and contract law can, consistent with the differing manner in which they conceptualise the public-private law divide more generally, be contrasted to the approach taken in other European states.⁹⁹ For example, under French law, the jurisdiction of the administrative courts does not depend on whether an authority is exercising a statutory or prerogative power or whether it has a ‘public element’, but is instead based on the notion of *public service* and crucially the notion of *public interest*, namely whether the body whose actions are disputed was ‘set up in the public interest to carry out a public service function’.¹⁰⁰ Thus, service of the public interest is regarded as the foundational principle of French administrative law and, therefore, as the litmus test for defining not only the ultimate purpose of the public administration but also for delimiting its permissible scope of action.¹⁰¹ This means that administrative action and entities in charge of a *service public* are generally governed by specific provisions which differ from private law.¹⁰² A contract will therefore be dealt with by the administrative courts where it relates to a public service duty, where it contains a clause that is not typical of a private contract or where it is categorised by the law as an administrative contract.¹⁰³ Where a contract falls within these

⁹⁹J.B. Auby, ‘Comparative Approaches to the Rise of Contract in the Public Sphere’ [2007] PL 40, 47-48.

¹⁰⁰J. Bell, ‘Administrative Law’ in J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008) 172.

¹⁰¹G. Merland, ‘L’intérêt général, instrument efficace de protection des droits fondamentaux?’ (2004) 16 *Les Cahiers du Conseil constitutionnel* 155, 155.

¹⁰²See R. Geiger, ‘The Unilateral Change of Economic Development Agreements’ (1974) 23 ICLQ 73, 95-99.

¹⁰³J. Arnould, ‘French public contracts law after the reform of March 2001’ (2001) PPLR 324, 335-336. See also A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) 55-58.

parameters, a separate body of procedural and substantive rules of administrative law is applied by the administrative courts, supported by a strong jurisprudence ensuring that the contract meets social needs.¹⁰⁴ In particular, even in the absence of any stipulation in the contract (or even if the contract states to the contrary), the public authority may always terminate the contract unilaterally and on the grounds of the general interest. Further, the principle of the adaptability of the public service means the public authority can oblige the private service provider to adapt the service or to terminate the contract. Finally, to ensure continuity of service in all circumstances, drastic changes in the conditions of performance of an administrative contract confer the right on the service provider to ask for a specific indemnity or, where appropriate, to increase its charges to consumers.¹⁰⁵ This focus on the public interest as the core principle of administrative law has also prevailed in those administrative law systems influenced by French law, such as Belgium, Greece, Luxembourg, Italy, Portugal, Spain and Turkey.¹⁰⁶

In contrast, in England, while legislation exists which allows for statutory powers to be conferred on private parties,¹⁰⁷ there is an absence of legislation or case law laying down

¹⁰⁴T. Posser, *Law and the Regulators* (Clarendon Press 1997) 287. See also C. Donnelly, 'Public-Private Partnerships: Award, Performance and Remedies' in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 491-493.

¹⁰⁵S. Whittaker, 'Unfair contract terms, public services and the construction of a European conception of contract' (2000) 116 LQR 95, 106-113. See also R. Geiger, 'The Unilateral Change of Economic Development Agreements' (1974) 23 ICLQ 73, 89.

¹⁰⁶J. Bell, 'Mechanisms for Cross-Fertilisation of Administrative Law in Europe' in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998) 149; E. Özücü, 'Conseil D'Etat: the French layer of Turkish administrative law' (2000) 49 ICLQ 679.

¹⁰⁷See for example Deregulation and Contracting Out Act 1994.

analogous principles to ensure that public-private contracts meet social needs.¹⁰⁸ As a result, concerns such as those relating to the adaptability of the contract or continuity of service must instead be addressed through contractual provisions (ie by private law means).¹⁰⁹ Thus, the manner in which the public-private law divide has been conceptualised in England does take account not of the hybrid nature of public-private contracts or of public-private arbitrations and has not been conducive to the development of a distinct legal and conceptual framework for public-private arbitration.

The second, related, reason to which the underdeveloped conception of public-private arbitration in England can be attributed is that arbitration in England has traditionally been embedded in private law and developed as an exclusively private mode of dispute resolution. English merchants and guilds have been using arbitration since the Middle Ages, mainly because the royal courts were deemed ill-suited to deal with commercial disputes.¹¹⁰ Arbitration in England was therefore conceived, designed and developed over the course of more than four centuries to accommodate contractual disputes between private parties, typically disputes arising out of maritime and sales of goods transactions

¹⁰⁸C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 343-345.

¹⁰⁹See P. Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 566, 559-560. See also C. Donnelly, 'Public-Private Partnerships: Award, Performance and Remedies' in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 483-486.

¹¹⁰J. D. M. Lew and M. Holm, 'Chapter 1: Development of the Arbitral System in England' in J. D. M. Lew, H. Bor, et al (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013) at [1.01].

or construction projects.¹¹¹ By the time public entities started to enter into contracts including arbitration clauses in the late twentieth century, the private character of arbitration law was well crystallised. Accordingly, the resolution of disputes involving public law and public entities was effectively shoehorned into a dispute resolution framework which had been operating as an entirely private mode of dispute resolution for a very long time. The result is that the significant expansion of the scope of judicial review of administrative action over the last 50 years has left undisturbed the private law paradigm on which arbitration is based.

VII. Does English arbitration law adequately protect the public interest in public-private arbitrations?

While administrative law scholars are familiar with the tension between public and private law norms in the context of the resolution of public-private disputes before English courts,¹¹² the issues arising from such tension within the setting of private dispute resolution, such as arbitration, are both uncharted and exacerbated. As we submit, the private law paradigm upon which English arbitration law is based leaves the public interest both unaccounted for, and unprotected, in public-private arbitrations. Specifically, the primacy afforded to the principle of party autonomy will typically prevent the English courts from intervening in public-private arbitrations, even when issues of public interest may arise. For example, while an application may be brought by

¹¹¹ibid. See also G. B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 34-38.

¹¹² See for example J. W. F. Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective on English Public Law* (Oxford University Press 1996); D. Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999).

a party to the courts under section 45 of the 1996 Act for the determination of ‘any question of law arising in the course of proceedings’ and while such applications may bring points of law of general interest before the courts,¹¹³ the scope of this section is subject to several limitations, including the fact that the arbitration tribunal itself may not refer a question of law for determination.¹¹⁴

Similarly, while the possibility for court review of the arbitration process under sections 67 to 69 of 1996 Act is intended to act as a public policy safeguard to some extent, the threshold for court intervention is set at a high level. Furthermore, the 1996 Act does not reference in any guise the concept of public interest as a possible ground for challenging an award nor does the case law in this area. Instead, the case law generally emphasises the deference that should be afforded to the arbitration process and confines itself to the specific grounds for challenge enumerated under sections 67 to 69.¹¹⁵

In addition, while certain elements of the law of arbitration are not encompassed within the parameters of the 1996 Act and are subject to common law principles,¹¹⁶ jurisprudence in those areas has, to date, failed to develop a coherent account of how the public interest may interact with the arbitration process. For example, under English law, arbitrability is a broad concept with few prescriptive rules as to its scope and

¹¹³Departmental Advisory Committee on Arbitration Law, ‘1996 Report on the Arbitration Bill’ (Chairman The Rt Hon Lord Justice Saville) (1997) 13 Arbitration Int’l 275 at [218].

¹¹⁴For further detail see Section VIII below.

¹¹⁵See for example *The Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4375 (TCC).

¹¹⁶See Arbitration Act 1996, s 81.

application.¹¹⁷ Instead, the English courts have approached the question of whether or not a particular dispute is arbitrable on a case-by-case basis, considering whether:

the matters in dispute...engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.¹¹⁸

However, Longmore LJ's judgment confirmed that what is considered a matter of public interest in this context is narrow in scope: '[t]o the extent therefore that public policy has a part to play it can only be a "safeguard . . . necessary in the public interest". This is a demanding test...'.¹¹⁹

Similarly, the common law recognises that it is an implied term of arbitration that the parties' desire for confidentiality and privacy generally outweighs the public interest in a public hearing.¹²⁰ This obligation of confidentiality also applies to any documents prepared for the arbitration, or disclosed or produced in the course of the arbitration and to transcripts or notes of the evidence in the arbitration.¹²¹ It also generally applies to the arbitral award itself, save that disclosure of the award in separate proceedings to enforce

¹¹⁷See generally J. D. M. Lew and O. Marsden, 'Arbitrability' in J. D. M. Lew, H. Bor, et al (eds.), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013).

¹¹⁸ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 at [40].

¹¹⁹*ibid* [98]-[99].

¹²⁰*Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314. See also Civil Procedure Rule 62.10.

¹²¹*John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

or protect the legal rights of a party to the arbitration agreement may be permissible.¹²² A number of exceptions to this general principle of confidentiality have developed,¹²³ including exceptions allowing for disclosure where it is required in the interests of justice or in the public interest.¹²⁴ However, while these exceptions could potentially be of particular relevance in the context of public-private arbitration, the public interest-based exception is not well-established under English law.¹²⁵ In addition, in delineating the scope of such exceptions, the English courts have not distinguished between public-private arbitration and private arbitrations. This means that, even in respect of public-private disputes with clear public interest implications, confidentiality remains the default rule.¹²⁶

Finally, it is often argued that any public interest concerns with regard to arbitration awards can be addressed at the conclusion of the arbitration process when English courts may refuse to recognise or enforce a domestic or international arbitration award where it would be contrary to English public policy to do so.¹²⁷ However, the public policy ground

¹²²See *Hassneh Insurance Co. of Israel and others v Mew* [1993] 2 Lloyd's Rep 243; *Associated Electric and Gas v European Reinsurance Co of Zurich* [2003] 1 WLR 1041.

¹²³See generally H. R. Dundas, 'Confidentiality in English Arbitration: The Final Word? *Emmott v Michael Wilson & Partners Ltd*' (2008) 74 Arbitration 458.

¹²⁴See *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [107].

¹²⁵A. Tweedale, 'Confidentiality in Arbitration and the Public Interest Exception' (2005) 21 Arbitration Int'l 61.

¹²⁶See Departmental Advisory Committee on Arbitration Law, '1996 Report on the Arbitration Bill' (Chairman The Rt Hon Lord Justice Saville) (1997) 13 Arbitration Int'l 275 at [13]-[16].

¹²⁷In respect of domestic awards, this ground for refusing recognition or enforcement is not included in the 1996 Act, but has been recognised by case law: see *Soleimany v Soleimany* [1998] EWCA Civ 285 and Arbitration Act 1996, s 81(1)(c). In respect of international awards, see Arbitration Act 1996, ss 101-104.

under English arbitration law has generally been narrowly construed.¹²⁸ For example, the Court of Appeal has stated that, in order for enforcement of an award to be contrary to public policy, there would have to be some element of illegality or if the underlying contract or activity violates principles of public policy which are ‘of the greatest importance’.¹²⁹ Finally, while the public policy ground has, to date, largely been considered in the context of arbitration awards rendered in disputes between private parties, there is no indication that the English courts would expand its scope where public-private arbitrations are concerned.

Therefore, while the concept of the public interest has, at times, been touched upon in arbitration case law, there is little indication that the public interest concerns that arise in the context of public-private arbitration are capable of being addressed within the existing private law understanding of arbitration under English law. This exclusively private law approach, endorsed by the legislature and judiciary, is reinforced by the manner in which arbitrators perceive their role. While the function and training of national judges is directed at serving the interests of the public and while judges are, particularly in public law cases, required to have regard to the broader societal implications of their judgments,¹³⁰ arbitrators (who are typically private lawyers) and who are appointed and paid by the parties may perceive their role and function as more akin to a service provider

¹²⁸See generally A. Sheppard and S. Brekoulakis, *Policies and Public Policy in English Arbitration Law* (Oxford University Press 2017 forthcoming).

¹²⁹*Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] EWCA Civ 1401. See also *Soleimany v Soleimany* [1998] EWCA Civ 285.

¹³⁰See A. Chayes, ‘The Role of the Judge in Public Law Litigation’ (1975-1976) 89 Harv L Rev 1281.

whose mandate comes from a private contract and who is responsible for resolving the dispute between the parties rather than protecting the public interest.¹³¹

These factors have all contributed to a conceptual and legal disconnect as between the private law sphere of arbitration and the public law sphere of administrative law. This disconnect exists despite the close connection that has been established by case law in other contexts between matters of public interest and the scope of public law. For example, in *Re McBride's Application*, Kerr J stated that 'an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally' and where it 'affect[s] the public' in particular.¹³²

This conceptual and legal disconnect is best illustrated by contrasting the narrow scope of review of arbitration awards by English courts with the approach taken by the English courts in respect of the judicial review of administrative action. Judicial review of administrative action in England, at least in its modern guise, has a substantially broad scope.¹³³ In particular, since the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission*¹³⁴ the scope of judicial review has been significantly broadened so that virtually all errors of law, including jurisdictional and non-

¹³¹P. Hodges and J. Greenaway, 'Duties of Arbitrators' in J. D. M. Lew, H. Bor, et al (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (Kluwer Law International 2013) at [15.49]-[15.52]. See also M. R. Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration' (1992) 10 Berkeley J Int'l L 59, 83.

¹³²[1999] NI 299, 310. See also *R v Legal Aid Board, ex p Donn* [1996] 3 All ER 1, 11.

¹³³J. Beatson, "'Public" and "Private" in English administrative law (1987) 103 LQR 34. See generally C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) ch 3.

¹³⁴[1969] 2 AC 147.

jurisdictional ones, are reviewable.¹³⁵ Crucially, the concept of error of law is broader than a mistake in the interpretation of a statute as, typically, the English courts tend to characterise all inferences from primary facts as questions of law.¹³⁶ Thus, a public body will commit an error of law if it acts where there is no evidence to support the action or comes to a conclusion to which, on the evidence, it could not reasonably have come.¹³⁷ Similarly, while public bodies are accorded discretionary powers when choosing between several decisions or courses of action, courts will supervise a decision in terms of whether the public body has, intentionally or inadvertently, unlawfully exercised its discretion, albeit the court will not substitute its own decision for the decision made by the public body.¹³⁸ Finally, and significantly, the introduction of the Human Rights Act 1998 has had broad implications for administrative law, including the introduction of new rules of statutory interpretation, and the requirement that public authorities act consistently with Convention rights, which has to some extent expanded the scope of judicial review, not least through the introduction of proportionality as the test of substantive view where Convention rights are at issue.¹³⁹ While the low-intensity irrationality review¹⁴⁰ which applies under the well-established *Wednesbury* test¹⁴¹ ensures that courts do not interfere

¹³⁵*Re Racal Communications Ltd* [1981] AC 374, 383; *R v Lord President of the Privy Council, ex p Page* [1993] 2 AC 682. See also B. Gould, 'Anisminic and Judicial Review' [1970] PL 358, 365.

¹³⁶J. Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 OJLS 22, 39-44. See also C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 511-513.

¹³⁷*ibid* 30. See also *Railtrack Plc v Guinness Ltd* [2003] EWCA Civ 188 at [51].

¹³⁸*Padfield v Minister of Agriculture* [1968] AC 997, 1030. See also A. W. Bradley, K. W. Ewing and C. J. S. Knight, *Constitutional & Administrative Law* (16th edn, Pearson 2014) 636.

¹³⁹T. Poole, 'The Reformation of English Administrative Law' (2009) 68 CLJ 142, 144-148.

¹⁴⁰See generally E. C. Ip, 'Taking a 'Hard Look' at 'Irrationality': Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) 34 OJLS 481.

¹⁴¹*Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1.

lightly with the substance of administrative decisions, judicial review is nonetheless notably broader than the review of arbitration awards by English courts.

Resolution of public-private disputes within this private law framework gives rise to a number of potential threats to the public interest. While not exhaustive of the possible ways in which public-private arbitration may conflict with fundamental public law norms,¹⁴² two threats will, in particular, be elaborated upon to illustrate the conceptual and legal void in respect of how public interest is accounted for in public-private arbitration.

The first possible threat arising out of the private resolution of public-private disputes is associated with the likely non-application of public law norms, including administrative law doctrines. Due to the hybrid nature of public-private contracts, the legal regime applicable to such contracts consists of both private law and certain public law rules and, therefore, public-private disputes may give rise to conflicts between private and public law. Let us assume, for example, that in the *E-Borders* case, the UK government had decided, in the light of new developments on immigration and security (for example the recent influx of immigrants and refugees from conflict zones and terrorist attacks in Europe), to significantly amend the specifications for the e-border system, or alternatively

¹⁴²For example, the fact that third parties are generally not permitted to intervene in arbitration proceedings (unless the parties otherwise agree) can be considered problematic in the context of public-private arbitration. This contrasts with judicial review proceedings in which third parties are permitted to intervene and put forward public interest-related arguments: see Public Law Project, 'Third Party Interventions in Judicial Review: an action research study' (2001); A. Asteriti and C. J. Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 801-803.

to cancel the contract altogether with a view to reconsidering UK immigration and border policy.

In such circumstances, the government's conduct would likely give rise to a dispute prompting the contractor to commence arbitration. This would almost certainly implicate the fundamental question of whether a contract may preclude a government from implementing important governmental policies, which would bring into play administrative law doctrines such as the *ultra vires* doctrine and the rule against fettering. The *ultra vires* doctrine reflects public law's concern with democratic accountability by requiring the government's actions to be authorised by elected representatives of the people.¹⁴³ The rule against fettering constitutes an application of the *ultra vires* principle and provides that, where a statute confers a discretionary power on a public body to act in the public interest, it is not permissible for that public body to put itself in a position in which it will not be able to exercise its discretion.¹⁴⁴ This rule affords the government the ability to change its policies in order to reflect the will of the people (particularly after a change in government) or to reflect new circumstances (such as the new developments in immigration and security described above).¹⁴⁵ This could result in a public body disrupting a public-private contract to pursue a competing public interest goal.¹⁴⁶

¹⁴³See generally A. C. L. Davies, 'Ultra vires problems in government contracts' (2006) 122 LQR 98.

¹⁴⁴See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610. See also C. Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] PL 111.

¹⁴⁵n 143 above, 105.

¹⁴⁶See for example HM Treasury, *Standardisation of PFI Contracts* (4th edn, 2007) at [1.4.5] which recognises the possibility of conflict between contractual obligations and the rule against fettering.

Of course, this tension between public and private law norms can arise whenever a dispute arises under a public-private contract and is not unique to public-private arbitration.¹⁴⁷ However, while courts in the common law tradition are required to take judicial notice of the public laws of their own State, without a need for such laws to be specifically pleaded or proved,¹⁴⁸ it is questionable whether this is the case in respect of arbitration tribunals.¹⁴⁹ Instead, arbitrators tend to take a predominately or exclusively private law approach to such disputes. Finally, the risk that mandatory rules of public law¹⁵⁰ are not considered in public-private arbitrations is further heightened by the narrow scope of review of arbitration awards by the English courts and by the lack of an arbitrator-driven mechanism for referring questions on points of law to the courts.

To illustrate this, in *Cory v London Corporation*,¹⁵¹ the public authority (London Corporation), in its capacity as a sanitary authority, entered into a waste collection

¹⁴⁷ See generally A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) ch 6.

¹⁴⁸ P. Capper, ‘‘Proving’ the Contents of the Applicable Substantive Law(s)’ in F. Bortolotti and P. Mayer (eds), *The Application of Substantive Law by International Arbitrators* (Kluwer Law International 2014) 39.

¹⁴⁹ See J. D. M. Lew, ‘The Basis for Applying Competition Law from an English Law Perspective’ in G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) at [14-026]-[14-029]; A. Sheppard, ‘Mandatory Rules in International Commercial Arbitration – An English Law Perspective’ (2007) 18 Am Rev Int’l Arb 121, 144-145.

¹⁵⁰ For a definition of mandatory rules of law see D. F. Donovan, ‘The Relevance (or Lack Thereof) of the Notion of “Mandatory Rules of Law” to Investment Treaty Arbitration’ (2007) 18 Am Rev Int’l Arb 205, 205. See also M. R. Baniassadi, ‘Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration’ (1992) 10 Berkeley J Int’l L 59, 69.

¹⁵¹ [1951] 2 KB 476.

contract with a private contractor. Subsequently, London Corporation, in its capacity as port health authority, changed its by-laws with the aim of improving hygiene standards. Such amendment rendered the contract unprofitable for the contractor. The waste collection contract contained an arbitration clause and the contractor referred the dispute to arbitration claiming a declaration that it was no longer bound by the (more onerous) contract. Given the public law aspects of the dispute, the arbitrator referred a question of law to the courts. Taking English public law into account, the Court of Appeal refused to imply into the contract a term that the contract would not be made more onerous (on the basis that such a clause would be *ultra vires*) and held that London Corporation was under a duty to make the by-laws regardless of their impact on its contracting partner and that the making of the by-laws did not constitute a breach or a repudiation of the contract.¹⁵² Crucially however, the reference to the English courts was only possible because the dispute was decided under the Arbitration Act 1950, section 21 of which was a mandatory provision which specified a ‘stated case’ appellate procedure.¹⁵³ However, the 1996 Act does not provide for such a procedure (indeed, it has not been a feature of English arbitration law since 1979).¹⁵⁴ In addition, as described above, both sections 45 and section 69 of the 1996 Act are frequently contracted out of and their scope is subject to several limitations. Therefore, as there is currently no arbitrator-driven mechanism for referring questions on points of law to the courts and no appellate procedure for disputes

¹⁵²n 143 above, 105-110. See also *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] WLR 204.

¹⁵³Section 21(1) provides as follows: ‘An arbitrator or umpire may, and shall if so directed by the High Court, state- (a) any question of law arising in the course of the reference; or (b) an award or any part of an award, in the form of a special case for the decision of the High Court.’

¹⁵⁴See generally Lord Hacking, ‘The “Stated Case” Abolished: The United Kingdom Arbitration Act of 1979’ (1980) 14 Int Lawyer 95.

implicating public law, it is likely that the *Cory* dispute would nowadays not have been referred to, or substantively reviewed by, the English courts under the 1996 Act. Furthermore, if the matter were to come before the courts in the course of setting aside or enforcement proceedings, the restrictive approach taken by the English courts to date in respect of the public policy ground would preclude consideration of administrative law doctrines.

The second possible threat identified is the threat to the fundamental public law norms of openness and accountability.¹⁵⁵ This threat arises as the details of the dispute before an arbitration tribunal, the conduct of arbitration and the final award are generally private and confidential.¹⁵⁶ As public bodies are given their powers on the basis that they are to be exercised in the public interest, the public has an interest in ensuring such powers are not abused. However, this objective cannot be achieved where the public law norms of openness and accountability are not applied.¹⁵⁷ This rationale applies as equally to the powers exercised by public bodies in respect of public-private contracts as to any other power, given the potential impact of contracting out on the public¹⁵⁸ and given that public-private contracts have, to some extent, replaced legislative commands as the

¹⁵⁵C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 46-47.

¹⁵⁶This point has been discussed in the field of investment treaty arbitration and in the context of the 'contracting out' of public functions: see for example G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) ch 7; G. Borrie, 'The Regulation of Public and Private Power' [1989] PL 552.

¹⁵⁷*R (on the application of Molinaro) v Kensington and Chelsea RLBC* [2001] EWHC Admin 896 at [67].

¹⁵⁸*ibid.*

paradigm of public administration and regulation.¹⁵⁹ As these types of disputes have repercussions for taxpayers and may affect the implementation of important governmental policies, it is in the interest of the public that these disputes, and the outcome of these disputes, become known to the public, and that the public body and its responsible officers are held accountable.¹⁶⁰

In the *E-Borders* case,¹⁶¹ for example, the arbitration proceedings were conducted in private and the arbitration award, including the details of the contractor's claims and the names of the arbitrators, remain confidential. Similarly, the details of a recent dispute between the National Health Service and Fujitsu in respect of the cancellation of an £896 million IT contract, which was submitted to arbitration, remain confidential, although industry reports claim that the dispute was settled in favour of Fujitsu.¹⁶² By keeping these types of public-private disputes and their resolution private and confidential, the public is deprived of the opportunity to consider 'what went wrong' and to attribute accountability to either the public body (in which case political accountability should ensue) or to the private party (in which case civil liability should follow).¹⁶³ Thus, as recently noted by Lord Chief Justice Thomas, while open court proceedings 'enable

¹⁵⁹M. Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing 1997) 21. See also T. Daintith, 'Regulation by contract: The new prerogative' (1979) 32 CLP 41, 41-42.

¹⁶⁰ A. Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) 227.

¹⁶¹See Section III above.

¹⁶²See S. Cameron, 'Oh dear, is this another costly IT failure?: Taxpayers deserve to know why Whitehall computer contracts keep going wrong' *The Telegraph* (London, 24 July 2014).

¹⁶³J. Freeman, 'The Contracting State' (2000-2001) 28 Fla St U L Rev 155, 200.

people to watch, debate, develop, contest, and materialize the exercise of both public and private power', arbitration does not do so.¹⁶⁴

VIII. Proposals to reform English arbitration law to take account of the public interest

The previous sections demonstrated that there is a conceptual and legal void in respect of how the public interest is protected in public-private arbitration under English law. This section puts forward proposals to reform English arbitration law, with particular focus on addressing the two threats to the public interest identified in Section VII. These suggestions do not include the removal of public-private disputes from the arbitral sphere entirely. The collapse of the non-arbitrability doctrine, the preponderance of arbitration clauses in public-private contracts and the established policy of English law favouring arbitration mean that it is neither practical nor desirable that arbitrators would be precluded from hearing disputes under public-private contracts. Furthermore, to deprive public bodies of the opportunity to enjoy the notable advantages of arbitration over litigation in terms of speed and flexibility could, of itself, have adverse implications for public welfare.

The main thrust of our proposals is that the existing legal framework of English arbitration law should be revised to, first, allow for more extensive court involvement in public-private arbitrations and, second, to restrict the application of the confidentiality principle.

¹⁶⁴Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', The Bailii Lecture 2016, 9 March 2016 at [49].

Implementing these proposals will require the English legislature and judiciary to introduce a distinction between the legal treatment of purely commercial arbitrations and public-private arbitrations and, in respect of the latter, to restrict the application of the ‘contractual’ or private law understanding of arbitration.

We turn first to the suggestion of amending the existing statutory framework to allow for a more extensive court involvement in public-private arbitrations to ensure that fundamental public law norms are considered. It is submitted that such intervention should be directed at providing determinations on questions of public law and should be available at two stages, namely during the course of an arbitration and at its conclusion. Thus, during the course of arbitral proceedings, the ability to apply to the courts for a preliminary determination of a point of law should be expanded in respect of public-private disputes. While, under section 45 of the 1996 Act, an application for a determination on any question of law may currently be made during the course of arbitral proceedings, several limitations apply to the scope of this section. In particular, the parties may agree in advance not to bring such applications and, even where the possibility of bringing such applications has not been excluded, the application may only be brought at a party’s initiative. Furthermore, unless all of the parties to the arbitration agree to the making of such an application, before such application may be considered, under section 45(2)(b), the arbitration tribunal must grant its permission and the court must be satisfied that both the determination of the question is likely to produce substantial savings in costs and that the application was made without delay. For these reasons, section 45 has, to

date, rarely been used.¹⁶⁵ In addition, while, historically, arbitrators enjoyed the ability to refer a question of law to the English courts,¹⁶⁶ an arbitrator, who should observe the mandatory laws of the chosen law,¹⁶⁷ currently cannot apply of his or her own initiative to the English courts for an authoritative determination on a point of English public law, even where the arbitrator in question has no legal training or no training in English law in particular. Particularly in respect of public-private arbitrations, the current position under English law thus seems an unwarranted overcorrection.

A new subsection should therefore be inserted into section 45 of the 1996 Act which, in respect of public-private arbitrations, would permit applications to be made by either a party to the arbitral proceedings or by the arbitral tribunal referring a point of public law for determination to the English courts. This subsection should be expressed to be without prejudice to the existing ability of parties to arbitral proceedings to refer questions of law to the courts under section 45(1) for commercial arbitrations and should include definitions of the terms ‘public-private arbitral proceedings’ and ‘public body’.¹⁶⁸ The

¹⁶⁵R. Merkin and L. Flannery, *Arbitration Act 1996* (5th edn, Informa Law 2014) 200. See *Beegas Nominees v Decco Ltd* [2003] EWHC 1891 (Ch); *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC); *Secretary of State for Defence v Turner Estate Solutions Limited* [2015] EWHC 1150 (TCC).

¹⁶⁶See B.J. Conrick, “‘Where the Kings Writ does not run’: The Origins and Effects of the Arbitration Act 1979 (1985) 12 QUT Law Rev 1, 2 and 12.

¹⁶⁷M. Blessing, ‘Mandatory Rules of Law versus Party Autonomy in International Arbitration’ (1997) 14 J Int’l Arb 23, 27.

¹⁶⁸The term ‘public law’ has not been defined in English legislation to date and it is therefore not proposed to define it for these purposes. However, a definition of the term ‘question of public law’ should be included in section 82(1) of the 1996 Act, which, consistent with the definition of the term ‘question of law’ would state that the term means ‘(a) for a court in England and Wales, a question of the public law of England and Wales, and (b) for a court in Northern Ireland, a question of the public law of Northern Ireland’.

term ‘public-private arbitral proceedings’ should encompass all arbitral proceedings involving a public body and another person who is not a public body and the term ‘public body’ should be defined in accordance with the established boundaries of English public law so as to encompass not only statutory bodies but also any person or body having functions of a public nature.¹⁶⁹

The new subsection of section 45 relating to public-private arbitral proceedings should also be included in the list of mandatory provisions in Schedule 1 to the 1996 Act so that its application may not be excluded by the parties’ contrary agreement.¹⁷⁰ The requirement under section 45(1) that the court is satisfied that the question of law ‘substantially affects the rights or one of more of the parties’ should, it is submitted, also apply in respect of the new subsection as to permit an application for a determination on a point of law which is inconsequential to the dispute would run contrary to both the autonomy of the arbitration process and to the principle of judicial economy. It is also submitted that, given the public interest implications involved, the criteria under the current section 45(2) should not apply to applications made under the new subsection (ie the agreement of both parties should not be required nor should the court need to be satisfied that determination of the question is likely to produce substantial savings in costs and that the application was made without delay).

¹⁶⁹A possible definition might read as follows: ‘a State, regional or local authority (including the Crown, but not including Her Majesty in her private capacity) and any other person or body having functions of a public nature’. The term ‘public body’ or ‘public authority’ has been defined by reference to such public functions in other UK legislation: see for example Companies Act 2006, s. 54; The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009, regs 2, 4-9 and 11.

¹⁷⁰ See Arbitration Act 1996, s. 4 and Schedule 1.

Turning next to our proposal regarding increased judicial intervention at the conclusion of the arbitral process, it is submitted that the existing power of the courts to review public-private arbitration awards for errors of law under section 69 of the 1996 Act should be expanded. For this purpose, section 69 should be amended in a manner similar to that proposed in respect of section 45 to draw a distinction between commercial arbitrations and public-private arbitrations. Therefore, it is submitted that section 69(1), which codified criteria developed by the courts in the context of commercial disputes,¹⁷¹ should continue to apply in respect of the former and a new subsection should be inserted into section 69 of the 1996 Act which, in respect of public-private arbitrations, would permit an appeal on a question of public law arising out of, or in connection with, the arbitration. Notably, this wording is broader than that under section 69(1), which refers to an appeal on ‘a question of law arising out of an award’ and which has been interpreted as meaning that the question of law must already have been considered by the arbitration tribunal in its award.¹⁷² As with section 45, this new subsection should be expressed to be without prejudice to the existing ability of parties to arbitral proceedings to refer questions of law to the courts under section 69(1) and should be included in the list of mandatory provisions in Schedule 1 to the 1996 Act so that, unlike the existing right of appeal under

¹⁷¹See *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema) (No.2)* [1982] AC 724. See also Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’, The Bailii Lecture 2016, 9 March 2016 at [19]-[20].

¹⁷²*Marklands Ltd v. Virgin Retail Ltd* [2003] EWHC 3428 (Ch). See also *Universal Petroleum Co Ltd v. Handels und Transport GmbH* [1987] 1 WLR 1187.

section 69(1), its application may not be excluded by the parties' contrary agreement.¹⁷³ Finally, while leave to appeal should be required in respect of applications under the new subsection (where all of the parties have not agreed to the appeal being brought), not all of the conditions specified in section 69(3) for leave to appeal to be granted should apply. Thus, while for the same reasons as outlined above in respect of section 45(1), the requirement under section 69(3)(a) that 'the determination of the question...substantially affect[s] the rights of one or more of the parties' should be included in the test for leave to appeal for public-private arbitrations, the requirement under section 69(3)(b) that the 'question is one which the tribunal was asked to determine' should not be applied as the parties should not have the power to exclude application of public law rules by not bringing such matters before the tribunal.

Turning to section 69(3)(c), it is submitted that neither of the alternative tests of correctness specified in that subsection should be applied in determining whether to grant leave to appeal a public-private arbitration award. First, the test under the current section 69(3)(c)(i), which requires the applicant to demonstrate that the decision of the tribunal was 'obviously wrong', is too narrow to address the public interest implications associated with public-private arbitrations as it requires that the alleged error be quickly and easily demonstrable.¹⁷⁴ While the alternative test under section 69(3)(c)(ii), in requiring that the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, is potentially less onerous, it has principally been

¹⁷³ It is notable that section 87 of the 1996 Act imposes restrictions on the ability of parties to a domestic arbitration agreement to exclude the jurisdiction of the courts under section 69 but this section was never commenced: see Departmental Advisory Committee, *Supplement to the DAC Report on the Arbitration Bill of February 1996* (1997) 13 *Arbitration Int'l* 317 at [47] – [49].

¹⁷⁴ See *AMEC Group Limited v Secretary of State for Defence* [2013] EWHC 110.

developed in light of the restrictive interpretation of the requirement that the question be one ‘of general public importance’ as referring to a question which may arise frequently in particular fields of commercial law and which needs to be judicially settled.¹⁷⁵ This interpretation is, however, unnecessarily restrictive for disputes engaging the public interest, the general public importance of which should be assumed. It is thus submitted that a new test of correctness should be developed for leave to appeal against public-private arbitration awards, which would require only that the decision of the tribunal is open to doubt. This test would strike an appropriate balance between, on the one hand, the finality and autonomy of the arbitral process and, on the other, the public interest in reviewing the correct application of fundamental provisions of public law.

Finally, it is submitted that the requirement under section 69(3)(d) that ‘despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question’ should not apply in respect of the new right of appeal. Under the existing right to appeal under section 69(1), whether this requirement is satisfied has been held by the English courts to be affected by a number of factors including the arbitrator’s knowledge of the law¹⁷⁶ and whether the respondent can show that it would suffer substantial injustice if leave was granted.¹⁷⁷ However, such factors should not constrain the possibility of an appeal on a point of public law in respect of public-private arbitration awards.

¹⁷⁵See D. St John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015) 540. See also *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema)* (No.2) [1982] AC 724, 742-743.

¹⁷⁶ *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd* [2004] EWHC 996 (Ch) at [23] - [25].

¹⁷⁷*HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC) at [56].

Turning to the appropriate scope of courts' review of public-private arbitration awards under this revised statutory framework, this question depends on two interrelated, but distinct, issues: first, the issue of whether the issue requiring determination (under section 45) or the alleged error of an arbitration tribunal (under section 69) involves a 'question of law' and, secondly, the test that the courts should apply in determining whether an arbitration tribunal has erred in law. While the term 'question of law' clearly suggests that findings of fact are not reviewable by English courts under section 69 of the 1996 Act,¹⁷⁸ a separate question arises as to whether English courts may review the issue of whether there was any evidence to support a tribunal's factual findings.

While, for commercial arbitrations, a narrow interpretation of the term 'question of law' which excludes review by the courts of whether or not the evidence supports the factual findings of the tribunal has a sound policy and doctrinal basis¹⁷⁹ (and is supported by the preponderance of case law in the commercial arbitration context),¹⁸⁰ it is submitted that

¹⁷⁸R. Merkin and L. Flannery, *Arbitration Act 1996* (5th edn, Informa Law 2014) 325-327.

¹⁷⁹See Arbitration Act 1996, s 34(2)(f) which leaves to the tribunal the decision of 'whether to apply the strict rules of evidence as to the admissibility, relevance or weight of any material (oral, written or other)...'. See also Departmental Advisory Committee on Arbitration Law, '1996 Report on the Arbitration Bill' (Chairman The Rt Hon Lord Justice Saville) (1997) 13 *Arbitration Int'l* 275 at [170] and Departmental Advisory Committee on Arbitration Law, '1996 Report on the Arbitration Bill' (Chairman The Rt Hon Lord Justice Saville) (1999) 15 *Arbitration Int'l* 413 at [286].

¹⁸⁰See *Geogas SA v. Trammo Gas Ltd (The Baleares)* [1993] 1 *Lloyd's Rep* 215, 228; *Demco Investments & Commercial SA v SE Banken Forsakring Holding AB* [2005] EWHC 1398; *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749; *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800. cf *Fence Gate Ltd v NEL Construction Ltd* (2001) 82 *Con LR* 41; *Guardcliffe Properties Ltd*

a broader interpretation of the term, which would permit judicial scrutiny of this issue, is warranted for public-private arbitrations. This proposal is supported by Steyn LJ's dictum in *Geogas SA v Trammo Gas Ltd (The Baleares)*¹⁸¹ who, in the commercial arbitration context, rejected this broader interpretation of the term 'question of law' as a 'redundant piece of baggage from an era when the statutory regime governing arbitration and the judicial philosophy towards arbitration, was far more interventionist than it is today'¹⁸² but noted that the power to review a finding of fact of a tribunal on the ground that there is no evidence to support it, and that there is therefore an error of law, is appropriate for public law cases.¹⁸³

This broader interpretation of the term 'question of law' is also consistent with leading authorities in the area of judicial review. In particular, in the House of Lords' decision in *Edwards v Bairstow*,¹⁸⁴ the defendant alleged that the General Commissioners of Income Tax had made an error of law in finding that a transaction to which he was a party was not 'an adventure or concern in the nature of trade' for tax purposes. Viscount Simonds stated that the finding that the transaction was not 'an adventure or concern in the nature of trade' is an inference of fact but could be set aside because it appeared that the

v City & St James [2003] EWHC 215 (Ch); *Benaïm (UK) Ltd v Davies, Middleton & Davies Ltd* [2005] 1370 (TCC).

¹⁸¹*Geogas SA v. Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215.

¹⁸²*ibid* 228.

¹⁸³*ibid* 232.

¹⁸⁴[1956] AC 14. See also the following arbitration case-law citing this line of authority: *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema) (No.2)* [1982] AC 724, 742; *London Underground Ltd v. Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC) at [53]-[56]; *Mary Harvey v Motor Insurers' Bureau* (QBD (Merc) (Manchester), Claim No: OMA40077, 21 December 2011) at [20]-[25] and [55]-[56].

Commissioners had acted without any evidence or on a view of the facts which could not reasonably be entertained.¹⁸⁵ Similarly, Lord Radcliffe stated that an error in law arises if the facts found are such that ‘no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal’.¹⁸⁶

Turning to the test that the courts should use to determine whether the tribunal has erred in law in the context of public-private arbitration awards, the appeal process under section 69 comprises two stages - first, the leave to appeal stage which acts as an initial filter and, secondly, the appeal itself. For the leave stage, as outlined above, the test for correctness should require only that the decision of the tribunal is open to doubt. Once the leave stage has been passed, a stricter approach at the appeal stage is justified¹⁸⁷ and, it is submitted that, while the manner in which a tribunal ascertains the facts should not be reviewable, the manner in which it ascertains the law and its final conclusion, in light of both the facts and the law, should be subject to review. Thus, an error of law should be inferred not only when the tribunal has stated the law wrongly, but also when the tribunal has stated the law correctly but it has arrived at a different conclusion from the one which a correct application of the law to the facts would inevitably lead.¹⁸⁸ Accordingly, while the fact that the court would have arrived at a different answer than the one arrived at by the tribunal is insufficient to overturn the award, the tribunal’s conclusion on a question of public law should be reviewable as to whether it is ‘out of conformity with the only correct answer or lies outside the range of correct answers’.¹⁸⁹

¹⁸⁵ibid 29-31.

¹⁸⁶ibid 36.

¹⁸⁷R. Merkin and L. Flannery, *Arbitration Act 1996* (5th edn, informa law 2014) 331.

¹⁸⁸*Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd’s Rep 503, 507.

¹⁸⁹ibid.

Turning to our second proposal which is designed to address the threat posed by the private and confidential nature of arbitration to the public law norms of openness and accountability, it is submitted that a distinction should also be introduced between purely commercial arbitrations and public-private arbitrations and greater weight should be given to the public law norms of openness and accountability in relation to the latter.¹⁹⁰ In particular, it is submitted that, in respect of public-private arbitration claims which come before the courts, public hearings should be permitted more frequently. This could be achieved through amending Rule 62.10(2) of the Civil Procedure Rules to provide that Rule 39.2 of the Civil Procedure Rules (which states that the default rule is that a hearing is to be in public) should apply to public-private arbitrations. Rule 39.2 also recognises that a private hearing may be required in certain exceptional circumstances (for example, where it involves confidential information and publicity would damage that confidentiality). The application of these exceptions in relation to public-private arbitration claims would ensure that the legitimate interests of the parties are protected and that inherently confidential information (such as commercially sensitive information of a financial, scientific or technical nature) does not enter the public domain. In conjunction with this amendment, a carve-out should also be inserted into Rule 62.10(3) to clarify that the default position that arbitration claims (apart from those under sections 45 and 69) are held in private does not apply to public-private arbitration claims.

¹⁹⁰See Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', The Bailii Lecture 2016, 9 March 2016 at [23] and [49].

Jurisprudential developments could also assist in ensuring that the public law norms of openness and accountability are applied in respect of public-private arbitrations. For example, as under Rule 62.10(1) it is open to the courts to make an order that an arbitration claim be held in public in any case, an increased willingness on the part of the courts to make such orders could have a similar effect to the proposed amendments to Rule 62.10(2) and (3). Furthermore, the scope of the current, jurisprudentially developed, ‘public-interest’-related exception to the general principle of confidentiality should be further defined (and possibly expanded) in respect of public-private arbitrations to allow for disclosure of information related to such arbitrations where there is an overriding public interest in doing so. Finally, while there has already been some recognition in English case law that, in contrast to documents and information disclosed in arbitration proceedings, arbitration awards should be capable of being published (at least in a redacted or summary form),¹⁹¹ this jurisprudence should be further developed in respect of public-private arbitration awards.¹⁹²

While these proposals, and in particular the suggested expansion of the scope of sections 45 and 69, may appear to run counter to the trend, worldwide and in England, towards reduction of court intervention in the arbitration process,¹⁹³ the changes proposed are

¹⁹¹n 122 above.

¹⁹²See B. Rix, ‘Confidentiality in International Arbitration: Virtue or Vice?’ Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015 arguing for curtailment of the confidentiality principle in respect of arbitration awards.

¹⁹³cf R. Finch, ‘*London: still the cornerstone of international commercial arbitration and commercial law?*’ (2004) 70 Arbitration 256, 264-265; Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’, The Bailii Lecture 2016, 9 March 2016 at [32]-[34].

tailored to address specific threats to the public interest identified in respect of public-private arbitrations and it is submitted that they go no further than is necessary to do so. In particular, introduction of a ground for review of factual errors is not proposed as there are no grounds to suggest that the ability of arbitrators to make findings of fact is reduced where disputes implicating the public interest are concerned and as permitting an extensive re-assessment of arbitral fact-finding would undermine the autonomy of the arbitration process.¹⁹⁴ Secondly, in order to ensure that the benefits of arbitration in terms of finality and expediency are preserved to the greatest extent possible, it is proposed that many of the existing limitations on the scope of sections 45 and 69 would also apply to the new form of review proposed in respect of public-private arbitrations. Such restrictions include the limits placed on the right to appeal the decision of the court under sections 45(6) and 69(8) respectively and the requirement to obtain leave to appeal in respect of section 69 applications. In addition, in relation to section 69 in particular, the proposed tests for determining whether the tribunal has erred in law at both the leave to appeal and appeal stages strike an appropriate balance between the autonomy of the arbitral process and the public interest in ensuring that public laws are considered in public-private arbitrations by preventing the reviewing court from substituting its own decision for that of the tribunal. Thirdly, application of the current requirement under sections 45(4) and 69(4) (requiring that the question of law be identified as well as the grounds on which it is said that the question should be decided by the court or that leave to appeal should be granted), together with the well-embedded policy in English law for minimal judicial intervention,¹⁹⁵ will ensure that attempts to take advantage of the expanded scope of review under sections 45 and 69 to delay or disrupt the arbitral process

¹⁹⁴See *Geogas SA v. Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215, 228.

¹⁹⁵See Arbitration Act 1996, s.1(c).

are likely to fail. Moreover, given that the vast majority of international disputes being arbitrated in England are of an exclusively commercial nature and that, in many cases, the law applicable to the substance of the dispute will not be English law (meaning that sections 45 and 69 will, in any event, not be applicable),¹⁹⁶ the suggested amendments will not affect the framework for resolving such disputes. Accordingly, any concerns that the amendments would have reputational implications for England as an arbitration-friendly jurisdiction, particularly in the context of the prolonged uncertainty associated with the outcome of the recent referendum suggesting that the UK leaves the EU, are misplaced.

Finally, the proposals are in line with developments in the law of judicial review, in particular, the abandonment of the distinction between jurisdictional and non-jurisdictional errors of law.¹⁹⁷ The proposals are also consistent with developments in other jurisdictions, for example, the recognition by the French courts that, where the application of mandatory public laws is concerned, a different approach to the review of arbitral awards is warranted¹⁹⁸ and, more generally, with the application in many civil law jurisdictions of a distinct set of legal principles to public-private contracts where disputes under such contracts have public interest implications.¹⁹⁹ Further, the proposals relating to transparency would serve to bring English arbitration law in line with legislative developments in other jurisdictions such as France and Brazil, which have recognised the need for increased transparency in arbitrations involving public bodies,²⁰⁰

¹⁹⁶See Arbitration Act 1996, s. 82(1).

¹⁹⁷*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁹⁸ See Section V above.

¹⁹⁹ See Section VI above.

²⁰⁰ See Section V above.

and with developments in the area of investment treaty arbitration such as the recent advent of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.²⁰¹

IX. Conclusion

English arbitration law has been characterised as a mature and highly developed body of law. While this is certainly the case in relation to commercial disputes, as English law lacks a distinct legal and conceptual framework for public-private arbitration and regards arbitration and public law as occupying separate legal spheres, the same cannot be said in respect of public-private arbitration. Rather the existing arbitration framework does not adequately account for the public interest in public-private arbitration. Therefore, this article argues that there is a need to reconceptualise public-private arbitration and to subject it to public law values. While engaging with this reconceptualisation process would require a willingness to depart from existing practices and principles, this reconceptualisation is necessary to ensure that the rise of public-private arbitration does not lead to the subjugation of the public interest to the hallowed arbitral principle of party autonomy.

²⁰¹UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration* (effective date 1 April 2014). See also United Nations, *Convention on Transparency in Treaty-based Investor-State Arbitration*, adopted by resolution of the General Assembly on 10 December 2014 and opened for signature on 17 March 2015.